



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 24, 1996

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-1745

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100813.

The Texas Natural Resource Conservation Commission (the "commission") has received a request for "all materials available" relating to an air quality permit application from Unimin Corporation ("Unimin"). You do not raise any exception under the Open Records Act (the "act") to required public disclosure. However, pursuant to section 552.305(a), you have declined to release certain information which Unimin identified as confidential when submitted to the commission, for the purpose of requesting an attorney general decision.

Pursuant to section 552.305, we notified Unimin of this open records request. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Unimin responded to our notification by asserting that the requested information contains trade secrets and confidential commercial information excepted from public disclosure under section 552.110 of the Government Code.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

In Open Records Decision No. 639 (1996), the Attorney General held that the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which interprets exemption four of the federal Freedom of Information Act ("FOIA"), was a "judicial decision" for purposes of section 552.110 of the Government Code. The *National Parks & Conservation Ass'n* case treats commercial or financial information as confidential

if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F. 2d at 770 (footnote omitted). Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted); Open Records Decision No. 639 (1996) at 4. To be held confidential under *National Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766. In the case at hand, we find that Unimin has made a specific showing that it actually faces competition and that substantial competitive injury would likely result from disclosure of this information. Consequently, we conclude that the commission must withhold the information Unimin seeks to withhold as confidential under section 552.110 of the Government Code.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long, sweeping horizontal line extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

¹As we resolve this matter under the "commercial or financial information" prong of section 552.110, we need not consider whether the information Unimin seeks to withhold is also a trade secret.

RTR/rho

Ref.: ID# 100813

Enclosures: Submitted documents

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